NO. 83-5776

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

Nov. 14, 1983

CHARLES TROY COLEMAN,

Petitioner,

-vs-

STATE OF OKLAHOMA,

Respondent.

WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS
PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is evidence obtained in an inventory search of a vehicle admissible consistent with Fourth and Fourteenth Amendment requirements where the inventory was not completed and standard police procedures were not followed?

2. Can the State, consistent with due process requirements of the Fourteenth Amendment and Eighth Amendment requirements of reliability in capital sentencing, seek the death penalty by introducing evidence of other crimes allegedly committed by defendant without first giving defendant notice of the State's intention to introduce such evidence.

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PETITION FOR WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS

Petitioner prays that a Writ of Certiorari issue to review the judgment of the judgment of the Oklahoma Court of Criminal Appeals entered in this case on July 11, 1983.

OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals was published and will soon be produced in Pacific Reporter Series. It is annexed as Appendix A. An Order denying Petition for Rehearing, supplemental Petition for Rehearing, and overruling Motion for New Trial based upon newly discovered evidence, is annexed as Appendix B. An order correcting opinion is annexed as Appendix C.

JURISDICTION

The judgment of the Court of Criminal Appeals was entered on July 11, 1983. A timely petition for rehearing was filed (Appendix D), a supplemental petition or rehearing and application to supplement the record was filed (Appendix

E), and a motion for new trial was filed (Appendix F). All of the foregoing were denied on September 19, 1983. Jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

This case involves the Fourteenth Amendment to the Constitution of the United States which provides, in relevant part:

> "... Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws."

The Fourth Amendment to the United States Constitution provides in relevant part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . ."

The Eighth Amendment of the United States Constitution provides in relevant part:

> "Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted."

This case also involved provisions of the Oklahoma Statutes:

1. O. S. 21 §701.9 Punishment for murder.

   A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life.

2. O. S. 21 §701.10 Sentencing proceeding: Murder in the First Degree.

   Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances

or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

3. 21 O. S. §701.12 Aggravating Circumstances

Aggravating circumstances shall be:
1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;
2. The defendant knowingly created a great risk of death to more than one person;
3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
4. The murder was especially heinous, atrocious, or cruel;
5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;
6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;
7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; or
8. The victim of the murder was a peace officer as defined by Section 99 of Title 21 of the Oklahoma Statutes, or guard of an institution under the control of the Department of Corrections, and such person was killed while in performance of official duty. Laws 1976, 1st Ex.Sess., c.1, §6, eff. July 24, 1976. Laws 1981, c.147, §1, eff. May 8, 1981.

STATEMENT OF THE CASE

The petitioner, CHARLES TROY COLEMAN, was convicted of murder in the first degree, O.S. §701.7 for the murder of John Seward. Killed in the same incident was Roxie Seward, John Seward's wife.

THE EVIDENCE AT TRIAL

Twenty-nine witnesses were called during the trial of this case. The trial lasted for several days. A full summary of the evidence would be very lengthy and is not necessary here. However, the basic facts are as follows: John and Roxie Seward were murdered in Muskogee County sometime between 1:30 and 4:00 P. M. on February 9, 1979 at the home of Mr. Seward's sister. [1]

The same day, at about 6:00 P. M., an off-duty Wagoner County jailor, Ralph Rose, observed defendant commit a traffic violation. (Tr. 434) Both vehicles stopped whereupon an argument developed, but no arrest was made initially. Officer Rose chased defendant twelve to sixteen miles, then arrested defendant with the assistance of other officers. (Tr. 445) The arrest was for the charge of possible DUI. Defendant's female companion was arrested for public drunk. (Ph. 343) Defendant was immediately handcuffed and placed in a highway patrol car. (Ph. 380) A search of defendant's vehicle was initiated by Office Rose, Highway Patrolman Smithson, and Wagoner County Sheriff Gilbert. During the search, the wallets of the deceased persons were discovered in defendant's glove compartment and various items of food stuffs from the home of John Seward's sister were discovered in the camper of the defendant's vehicle. At the scene of the arrest, the law officers involved in the search were unaware of the details of the homicide and did not immediately connect the evidence with the homicides. Patrolman Smithson gave Officer Rose an inventory sheet with instructions to fill it out, then, along with Sheriff Gilbert, transported defendant to jail. While the Sheriff and Highway Patrolman were transporting the defendant to jail, they became aware of the connection between the homicide and the evidence seized from defendant's vehicle. Patrolman Smithson then

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1. The record of the Oklahoma Court of Criminal Appeals consists of a bound record consisting of instruments filed in the trial court (hereinafter referred to as "R.") and a trial transcript (hereinafter referred to as "Tr.") and a transcript of the preliminary hearing (hereinafter referred to as "Ph.").

notified Rose not to touch anything and not to let a tow wrecker hook on to the defendant's vehicle. Later, Oklahoma State Bureau of Investigation Agent Chrisco was sent by the District Attorney of Muskogee County to process the vehicle and gather evidence of the homicides.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Prior to trial, petitioner filed motion to suppress all evidence obtained as a result of the search of his vehicle. The trial court entered an order overruling the petitioner's motion. On appeal to the Oklahoma Court of Criminal Appeals, the question of the search and seizure was briefed and argued. The court held the evidence was validly seized during an inventory of petitioner's vehicle.

2. The question of the admissibility of evidence of a kidnapping of a police office was first raised when the evidence was presented. On appeal to the Oklahoma Court of Criminal Appeals, the issue was briefed and argued. The court held that the state's bill of particulars notified petitioner of the existence of the evidence and that petitioner and his trial attorney had notice of the evidence from a transcript of a hearing in a different county on an unrelated case.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO ENABLE CONSIDERATION OF WHETHER EVIDENCE FROM AN INVENTORY SEARCH IS INADMISSIBLE CONSISTENT WITH FOURTH AND FOURTEENTH AMENDMENT REQUIREMENTS WHERE STANDARD POLICY PROCEDURES WERE NOT FOLLOWED AND WHERE THE INVENTORY ITSELF WAS NOT COMPLETED

Since this court's decision in South Dakota v. Opperman, 428 U.S. 364, 49 L. Ed. 2d 1000, 96 S. Ct. 3092, it has been settled case law that evidence obtained in a routine inventory of a vehicle, conducted pursuant to procedures, is admissible. The facts of this case are different.

The Oklahoma Court of Criminal Appeals originally held that an inventory, from which incriminating evidence was obtained, was initiated by Officer Rose and Trooper Smithson, and properly completed by Agent Chrisco. (App. A, p.4) However, in response to defendant's petition for rehearing, the court issued a corrected opinion deleting that holding and in its stead entered a finding that Rose and Smithson discovered the evidence after initiating an inventory in good faith. (App. C) The court found the failure of the officers to fill out the required inventory sheet to be immaterial and the failure of the officers to complete the inventory itself to be justified.

Each of the three officers who participated in the search of the defendant's truck and camper have repeatedly testified that they did not do an inventory.

At trial, on direct examination Officer Rose testified as follows:

> "Q. So, you didn't physically do the inventory?
>
> A. No, sir. I didn't get around to that. They told me to cancel, cancel that." (Tr. 448)

Further, on cross examination Officer Rose testified as follows:

> "Q. You didn't make an inventory of that vehicle in any way, did you?
>
> A. No, sir.
>
> Q. You don't know what was in there, do you?
>
> A. No, sir." (Tr. 456-457)

Trooper Smithson testified at the preliminary hearing that a search of he defendant's vehicle was started, and that he was assisting Office Rose. (Ph. 391)

Subsequently, in a civil suit filed by the defendant in federal court Smithson testified as follows: (App. F., Exhibit B, p. 24)

> "Q. Did you make an inventory of any sort?
>
> A. No, sir.
>
> Q. Or any notes?
>
> A. No sir, I did not handle the inventory of the vehicle."

Agent Chrisco has always testified that his search, at the direction of the district attorney, was to discover evidence of a homicide. (Ph. 303, 305, 322) (App. F., Exhibit B, p. 9)

In Opperman, supra, this court concluded that inventory searches were permissible because:

> "On this record we conclude that in following standard police procedures, prevailing through out the country and approved by the overwhelming majority of the courts, the conduct of the police was not 'unreasonable' under the Fourth Amendment."

Standard police procedures were not followed here, nor were the requirements of the Oklahoma Court of Criminal Appeals. Trooper Smithson testified that the Oklahoma Highway Patrol requires that an inventory sheet be filled out. (Tr. 472, 473) The Oklahoma Court of Criminal Appeals has held unequivocally that standard police procedures require that an inventory sheet be filled out. In McGann v. State, 601 P. 2d 123 (Okl. Cr. 1979), the court stated:

> ". . . an inventory sheet showing the contents of the vehicle must be filled out appropriately. Anything less points to the possibility that the inventory is a subterfuge for an exploratory search."

Here the record is undisputed. No inventory sheet was filled out. At trial Rose stated that he had an inventory sheet but never filled it out. (Tr. 448) Trooper Smithson likewise never filled out an inventory sheet. (Tr. 485)

Petitioner does not urge this court to reverse the lower court on a mere legal technicality: the petitioner believes the letter and the intent of the law has

been clearly violated. Petitioner would urge this court to compare the reasoning in Opperman supra, which justifies an inventory search, to the facts concerning the police conduct in this case.

In Opperman, supra, the majority opinion, and that of the concurring opinion of Justice Powell, stated that inventory searches were not unreasonable because they accomplished the following purposes:

1. Provided protection of the owner's property while it remains in police custody.
2. Provided protection to the police against claims and disputes over lost or stolen property.
3. Provided protection to the police from danger.

In order to achieve the first two purposes, a complete inventory of the contents of the vehicle must be made. Likewise, a detailed list of the property discovered must be filled out. An absence of the completed inventory would subject the defendant's property to pilfering and/or the police to claims of theft. As the Oklahoma Court of Appeals succinctly stated in MaGann, supra, "anything less points to the possibility that the inventory is a subterfuge for an exploratory search."

Protection of the police from danger was never a concern in the instant case. The defendant was handcuffed immediately upon arrest. (Ph. 344) Rose testified that the defendant gave no indication of running. (Ph. 366) Rose further stated that the defendant had no access to the vehicle after the arrest. (Ph. 366) With regard to potential danger to the police, Trooper Smithson testified that: (Ph. 199)

> "Q. At the time you made your search, the defendant was already handcuffed, wasn't he?
>
> A. Yes, he was.
>
> Q. You weren't in fear that he was going to get something out of the vehicle and harm you with it, were you?
>
> A. No. Not at this point I wasn't."

From a purely technical point of view, in order to satisfy the legal requirements, a complete inventory of all the contents of the vehicle must be made. Secondly, a sheet containing an itemized list of defendant's property must be filled out. Neither of these requirements were met in the instant case.

In addition, the public policy reasons that justify such police inventories as reasonable searches were not satisfied in this case. Defendant's property was not protected. The police were not protected from defendant's claims, and finally the police by their own admission were not exposed to any danger at the time of the search.

It is fundamental that a warrantless search is "per se unreasonable under the Fourth Amendment". Coolidge v. New Hampshire, 403 U.S. 443, 29 L. Ed. 2d 564. Therefore, once a defendant establishes that evidence was seized as a result of a warrantless search the burden then shifts to the state to show that said search was reasonable because it would fall within the "few specifically established and well delineated exceptions" to the Fourth Amendment requirement that a search have the prior approval of a judge or magistrate.

Here, because the state did not even come close to doing a complete inventory, and because the paperwork was utterly ignored, the state has clearly failed to meet their burden of showing this case could fall within the routine police inventory "exception" to the Fourth Amendment requirements.

The Attorney General's brief to the Oklahoma Court of Criminal Appeals basically concedes that under existing Oklahoma law the inventory would be invalid. Page 19 of the Attorney General's brief it is stated:

> "Essentially, five criteria are necessary to upiold he validity of an impoundment and inventory: ...
>
> (4) the inventory must be conducted by police officers, preferably the arresting officer and conducted pursuant to departmental policy, Gonzalles, supra; and
>
> (5) an inventory sheet showing the contents of the vehicle must be filled out appropriately; MaGann v. State, 601 P. 2d 123 (Okl. Cr. 1979)."

On Page 20 of the Attorney General's brief it is stated:

> "It is the position of the state, therefore, that this court should adopt the 'inevitable

discovery' exception to the exclusionary rule and uphold the search as a valid inventory search."

The Oklahoma Court of Criminal Appeals bridged this gap by simply stating:

"It was only the sudden focus upon the defendant as a murder suspect which prevented the completion of the list." (App. C)

The record does support the court's finding that the defendant suddenly became a suspect in a murder case. There is, however, nothing in the record to show that this fact "prevented" the police from making or completing an inventory.

The record objectively indicates that the state police never intended to do an inventory. The person allegedly left to complete the inventory was Officer Rose and he was off duty. (Ph. 351) His wife and children were with him. (Ph. 353) The tow wrecker arrived to retrieve the defendant's vehicle just as the highway patrol car left. (R. 447) The tow wrecker had hooked onto the backend of defendant's vehicle and hoisted it up into the air. (Ph. 364, 368, 369) Later Rose received a radio call from the sheriff directing him not to "touch" anything, and not to let the tow wrecker hook onto the vehicle. (Ph. 349)

If Rose had ever intended to make an itemized list of contents of the vehicle and camper he would have never allowed the wrecker to attach and lift the defendant's vehicle into the towing position. At that point it would have been extremely dangerous and next to impossible to enter the vehicle to conduct an inventory.

Petitioner respectfully suggests that the police made an exploratory search at the time of defendant's arrest. The alleged "inventory" is merely a label which the state later placed on the search in an effort to meet Fourth Amendment requirements. As in MaGann, supra, the inventory label was a subterfuge to ratify a warrantless exploratory search.

II.

THIS COURT SHOULD REVERSE PETITIONER'S DEATH SENTENCE SUMMARILY ON THE GROUNDS THAT THE PETITIONER WAS NOT AFFORDED NOTICE CONSISTENT WITH FOURTEENTH AMENDMENT DUE PROCESS STANDARDS AND EIGHTH AMENDMENT REQUIREMENTS OF RELIABILITY IN CAPITAL SENTENCING.IN THE SENTENCING STAGE OF THE TRIAL

Oklahoma's first degree murder statutes provide for a bifurcated trial. If the defendant is convicted of the crime charged, evidence concerning aggravation and/or mitigation is presented to the jury.

Due process in the second stage of the trial is mandated by state law. Title 21, Section 701.10 of the Oklahoma Statutes reads, in pertinent part:

> "Only such evidence in aggravation as the state has made known to the defendant prior to the trial shall be admissible."

Shortly before trial, the state filed a Bill of Particulars (R. 86) and an Amended Bill of Particulars (R. 140) in an effort to comply with the above quoted statute. The Bill of Particulars and Amended Bill of Particulars are annexed here as Appendix G. These documents describe in great detail numerous instances of alleged misconduct by defendant. However, no where in the Bill of Particulars is it made known to the defendant that the state would offer evidence of the kidnapping of an Arizona police officer, threats to kill the police officer, or the taking of the police officer's car and gun. Despite the absence of these matters from the Bill of Particulars, the state went to great lengths to prove all of these incidents. During the second stage, Eli Maghee testified:

> ". . .He had gotten excited and kidnapped the law enforcement officer and tied him up, ..."
> (Tr. 890)

Officer Terry Parish testified that defendant abducted him (Tr. 917), defendant threatened to kill him twice (Tr. 915, 917), defendant took his gun (Tr. 916) and his vehicle (Tr. 916). Officer Parish also testified that he was married and had three children. (Tr. 927)

The Oklahoma Court of Criminal Appeals held that defendant had specific notice that defendant escaped from the county jail, and that the kidnapping occurred during the five day period after defendant's escape. (App. A) **Petitioner respectfully submits that notice of an escape from jail is hardly notice of a**

kidnapping charge. This is especially true when the Bill of Particulars specifically list with great particularity other crimes allegedly committed by defendant after the escape, but omits the kidnapping offense.[2]

Notice of charges and an adequate opportunity to prepare a defense are basic to due process. In the case of Cole v. Arkansas, 333 U. S. 196, 92 L. Ed. 64 (1948), it is stated:

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a change to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." (Emphasis added)

In the case of In Re Oliver, 333 U. S. 257, 94 L. Ed. 682 (1948), this Court stated:

> "A person's right to reasonable notice to a charge against him, and an opportunity to be heard in this defense-a right to his day in court-are basic in our system of justice."

Oliver and Cole were cited by this court with approval In Re Gault, 387 U. S. 1, 18 L. Ed. 2d 527 (1967). In Gault, this court observed as follows with regard to the quality of notice required for due process:

> "Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity'." (Emphasis added)

The Oklahoma Court of Criminal Appeals cites Chaney v. State, 612 P. 2d 289 (Okl. Cr. 1980) for the proposition that §701.10 is essentially a "notice" status. Petitioner is in complete agreement. Under the statute, the State is required to give notice, consistent with due process principles, of the evidence to be used against defendant. Vague allegations contained in the Bill of Particulars that

---

2. The Bill of Particulars recited five prior felony convictions. Three of which occurred more than 10 years earlier, and two of which occurred 7 years earlier. The circumstances of the instant case were recited in detail. The remainder described defendant's escape from the county jail, an assault with a deadly weapon which occurred in Luther, Oklahoma, and a murder which occurred in Tulsa, Oklahoma. Excluding the prior felony convictions, this case, and the Tulsa murder charge, defendant has never been tried nor convicted of any of the other charges contained in the Bill of Particulars. Defendant was convicted in the Tulsa case, but the conviction has been reversed and remanded by the Oklahoma Court of Criminal Appeals.

defendant went beyond the borders of the State of Oklahoma, and created a danger to citizens of this State and other areas of the nation does not satisfy due process principles, nor does it satisfy reliability of sentencing criteria of the Eight Amendment. See: Gardner v. Florida, 430 U. S. 349, 97 S.Ct. 1197 (1977). Under Cole v. Arkansas, supra, the State must furnish the defendant with the specific charge against the defendant. Under Gault, the State must set forth the misconduct with "particularity".

Petitioner suggests the contents of the State's Bill of Particulars in no way specifically or particularly notifies this defendant that evidence of a kidnapping, a car theft, and a threat to kill a policeman, will be offered against this defendant.

The Court of Criminal Appeals further held that defendant had notice because the Arizona officer testified about these matters in a hearing in Tulsa County and that defendant's trial attorney in this case provided with a copy of he transcript of that hearing.

In the Attorney General's brief to the Court of Criminal Appeals, at page 75, the following concession on the subject is made:

> "Although defendant's attorney may have been surprised by the testimony, the state's obligation to give notice applies only to the defendant. The fact that the defendant may not have informed his attorney does in no way alter the state's burden."

Defendant's trial attorney did, in fact, receive the transcript from the Tulsa County case. The question is when did he receive it? Defendant's trial in this case commenced on the 25th day of September, 1979. The certificate from the Tulsa County court reporter shows that the transcript in question was only completed on September 21, 1979. (App. H, Exhibit A) September 21, 1979 was a Friday.[3] The very earliest defendant's attorney could have received the transcript would have been on Monday, the day before defendant's trial in this case commenced.

Petitioner submits that receipt of the transcript one day before trial is not the advance notice required under Gault, supra. Further, petitioner submits to the court that a defense attorney who is on the verge of trying a major murder case simply cannot be held responsible for the contents of a lengthly preliminary hearing transcript concerning a charge, which that attorney is not defending, and which took

3. Petitioner asks the Court to take judicial notice that September 21, 1979 was a Friday by referring to a 1979 Calendar.

place in another county. This is particularly true when the defense attorney is led to believe from the filing of a Bill of Particulars and an Amended Bill of Particulars that he already has notice of all extraneous matters that may come up during the course of the trial.

Under Oklahoma law, introduction of improper aggravating circumstances necessarily requires that the sentence be modified to life imprisonment. In Johnson v. State, 665 P. 2d 815, (Okl. Cr. 1983) the court held:

> "Therefore, since this court is unwilling to speculate as to the effect the improper aggravating circumstance, murder for remuneration, had on the jury's recommendation to impose the death penalty, we find it necessary to modify the sentence to life imprisonment in accordance with section 701.13 (e). When prejudicial error occurs in the sentencing stage of the trial only, this court has consistently modified the death sentence to life imprisonment and otherwise affirmed."

CONCLUSION

For the reasons stated above, the petitioner respectfully requests a writ of certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF MAILING

I, the undersigned, do hereby certify that on this _____ day of October, 1983 a true and correct copy of the above and foregoing Petition for Certiorari and all accompanying documents was mailed, postage pre-paid, to Michael C. Turpen, Attorney General, State of Oklahoma, Suite 112, State Capitol, Oklahoma City, Oklahoma 73105.

D. D. Hayes

CASE NO. 83-5776

IN THE SUPREME COURT OF THE UNITED STATES

TERM, 1983

CHARLES TROY COLEMAN, Petitioner

v.

THE STATE OF OKLAHOMA, Respondent.

ON WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Charles Troy Coleman, moves that the Court grant leave for him to proceed in forma pauperis. As grounds for this Motion, the Petitioner would state that he is currently confined in a penal institution and is unable to pay the fees and costs associated with seeking review of this Court. The factual grounds for this Motion are further detailed in the Affidavit of the Petitioner filed herewith.

For the reasons stated, the Petitioner requests that this Motion be granted.

Respectfully submitted,

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COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES TROY COLEMAN,

Petitioner,

vs

STATE OF OKLAHOMA,

Respondent.

83-5776

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, CHARLES TROY COLEMAN, being first duly sworn, state that I am Petitioner in the above entitled case; that in support of my motion to proceed without being required to pay fees, costs, or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I was previously granted leave to proceed without costs, on grounds of poverty, during proceedings on this case in the Oklahoma Court of Criminal Appeals.

I further swear that the reponses which I have made to the questions below relating to my ability to pay the cost of prosecuting the appeal are true:

1. Are you presently employed?

Answer: No, I am presently in the custody of the Oklahoma Department of Corrections, serving the sentence for which I am petitioning the Court for review. I have been imprisoned since Oct 12, 1979.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest dividends, or other sources?

Answer: No.

3. Do you own any cash or checking or savings account?

Answer: Yes, my institutional account currently contains $.00.

4. Do you own any real estate, stocks, bonds, notes automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

Answer: No.

5. List the persons who are dependent upon you for support and state your relationship to these persons.

Answer: None.

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

CHARLES TROY COLEMAN

STATE OF OKLAHOMA)
) ss.
COUNTY OF [illegible])

Subscribed and sworn to before me this [illegible] day of November, 1983.

NOTARY PUBLIC

My Commission Expires:

[illegible]

Appendix "A"

83-5776

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUL 11 1983
Ross N. Lilliard, Jr.
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CHARLES TROY COLEMAN,
Appellant,

-vs-

THE STATE OF OKLAHOMA,
Appellee.

FOR PUBLICATION

No. F-79-600

AUTHORIZED FOR FILING
JUL 11 1983
COURT OF CRIMINAL APPEALS

OPINION

BUSSEY, Presiding Judge:

Charles Troy Coleman was convicted of Murder in the First Degree, in Muskogee County District Court, Case No. CRF-79-76. In the second stage of the trial, pursuant to 21 O.S.1981, § 701.10, the jury assessed the death penalty.

At approximately 4:15 p.m. on February 9, 1979, John Seward was found in the basement of his sister's home, dead as a result of a single shotgun wound to the back of his head. His wife, Roxie Seward, was found next to him, dead as a result of four shotgun wounds inflicted from only inches away. Determined to be missing from the home of Mr. and Mrs. B.L. Warren were the Seward's wallets, Mrs. Warren's turquoise watch, packages of frozen meat stamped "Hogle, Not for Sale," and various other food items.

Later that same day, shortly after 6:00 p.m., the defendant was stopped and arrested for traffic violations. A search of the camper pickup truck he was driving revealed the Seward's wallets, the packaged meat and other various food items, which were subsequently identified by Mrs. Warren at trial as being from her pantry.

I.

In his first assignment of error, the defendant alleges that the trial court erred in failing to suppress all evidence obtained as a result of the warrantless search of his pickup truck. Specifically, the defendant alleges the following: That the

warrantless search was not justifiable as incident to an arrest for a traffic offense; that his vehicle was illegally impounded on private property; that the alleged inventory search was a subterfuge; and that there was no consent to search the vehicle.

At approximately 6:00 p.m. on the afternoon in question, Officer Ralph Rose, an off-duty dispatcher for the Wagoner County Sheriff's Department, motioned at the defendant for speeding and passing in a no passing zone, by shaking his finger at him as he passed. Officer Rose testified that Coleman pulled his pickup truck to the side of the road, and a conversation ensued which culminated when Coleman got back into his vehicle. As the defendant departed at a high rate of speed, Officer Rose testified that he observed the passenger in the defendant's truck drinking a beer. Rose turned on his red lights and pursued the defendant at speeds up to 100 miles per hour. With the assistance of Highway Patrol Trooper Glen Smithson and Wagoner County Sheriff Tommy Gilbert, Officer Rose stopped the defendant's vehicle and placed him under arrest for various traffic violations and possible driving under the influence of intoxicating liquor. Since Officer Rose observed the defendant speeding, passing in a no passing zone, attempting to elude an officer and exhibiting intoxicated behavior, he had probable cause to arrest Coleman, pursuant to 22 O.S.1981, § 196, for committing misdemeanors in his presence. Thus, Coleman's initial arrest was proper and valid.

The defendant relies upon Lee v. State, 628 P.2d 1172 (Okl.Cr.1981) and Kelly v. State, 607 P.2d 706 (Okl.Cr.1980), to support his argument that his vehicle was on private property and therefore the law enforcement officers were without authority to impound it without a request by the property owner. We are of the opinion that the facts in the instant case are distinguishable from the facts in Lee, supra, and Kelly, supra. In the instant case the vehicle in question was involved in a high speed, hot pursuit chase which ended only when the defendant pulled into a residential driveway and stopped.

Coleman initially contended that he lived at the residence; however, Sheriff Gilbert was personally acquainted with the people who owned the property, and knew that neither the defendant nor others whom he subsequently claimed to be visiting lived there. It was obvious to the officers that the defendant had merely driven his vehicle into the residential driveway to seek sanctuary. From Sheriff Gilbert's association with the actual residents and the presence of perishable foodstuffs in plain view in the truck's camper, it was apparent that the vehicle would have to be removed from the property. Coleman was in custody; his companion who had been observed drinking beer was properly forbidden to drive the vehicle; and, the defendant was unable to make other arrangements for the safekeeping of his belongings. We are of the opinion that the officers acted properly when they impounded the defendant's vehicle for the purpose of caretaking the defendant's property in accordance with South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976).

Trooper Smithson testified that he handed an inventory sheet to Officer Rose and instructed him to inventory the truck while he and Sheriff Gilbert transported the Colemans to the Wagoner County Jail. Furthermore, the trooper stated that while taking the defendant into custody, he had observed, in plain view, open wallets in the truck's glove compartment bearing the names "Seward," and a box of frozen meat stamped "Hogle, Not for Sale," in the truck's camper, and that he routinely questioned Coleman about them. In route to Wagoner, his investigatory instincts having been aroused, Trooper Smithson radioed the scene of the ongoing homicide investigation in Muskogee County and inquired whether the victims' names were "Seward" and if meat stamped "Hogle, Not for Sale," had been taken. Upon receiving an affirmative reply, Trooper Smithson immediately stopped his cruiser, handcuffed Jeanette, read both Colemans their Miranda rights, turned his vehicle around and transported the Colemans to the Muskogee County Jail.

Officer Rose stated that pursuant to a radio communication from Trooper Smithson, informing him that the Colemans had been arrested as suspects in the Muskogee murders, he stopped his inventory, without having written anything on the inventory sheet, and waited for homicide investigators to arrive.

Both Officer Rose and Trooper Smithson testified that the inventory was initiated pursuant to established departmental policy. Swain v. State, 621 P.2d 1181 (Okl.Cr.1980).

We find that the completion of the inventory by OSBI Agent Chrisco, two hours after Coleman's vehicle was towed to the Muskogee Police Department Impound Garage, was reasonable under the circumstances of inclement weather. South Dakota v. Opperman, supra. Agent Chrisco testified that he assisted in the inventory of the defendant's vehicle at the scene and that due to cold weather he completed the inventory at the Muskogee Police Department's Impound Garage.[1] There is no evidence whatsoever that the inventory was a subterfuge, as it was started prior to Coleman being connected to the homicides, and his consent to an inventory was not required. The arrest of the defendant and the subsequent impoundment and inventory of his vehicle were proper, and the evidence of which defendant now complains was properly admitted. This assignment of error is without merit.

II.

In his second assignment of error, the defendant alleges that the trial court erred in failing to exclude statements made by him at the time of his arrest, because he did not immediately receive the Miranda warnings. Defendant complains of three separate incidents in which Officer Smithson testified that the

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[1] Although the defense argued at oral argument that the inventory was incomplete, the record before us refutes such an assertion, as Agent Chrisco testified that he did indeed complete the inventory and in fact referred to an extensive list of itemized meats and foodstuffs at trial. (Tr. 537 & 538).

defendant made inculpatory statements to questions regarding the wallets, groceries, and the defendant's reasons for stopping at the residence where he was arrested.[2]

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[2] Specifically the defendant complains of the testimony by Officer Smithson as follows:

OFFICER SMITHSON:

> A. I -- uh, went back and asked Mr. Coleman if--what his last name was and he told me. And I asked him what his in-laws' name was, and he told me that, and I don't remember what his in-laws' name--what he said they were, but it was not Seward. And, at that point, I went over and asked Mrs. Coleman the same questions, and neither of her answers were Seward either. So, I went back then and asked, Mr. Coleman where he had got the wallet. And he told me he had been to the Eight-Ball the night before, which is a Club in Muskogee, and he said that he had picked up a woman and her husband there who were having an argument and they had pickup trouble and they gave them a ride home. He said, apparently, she had left her wallet in the pickup and about this time Sheriff Gilbert and Ralph Rose was in the rear of the vehicle looking in it and they had discovered some groceries and meat and stuff in it and they called me over to look at it, and on the meat it had a name stamped HOGLE, and it was processed meat, and it had NOT FOR SALE stamped on it. I went back and asked Mr. Coleman about this and he told me that they had been to the Warehouse Market to buy groceries and he said that they bought their groceries there. I asked him if he bought all of them there, and he said: Yes, we bought all of our groceries at the Warehouse Market. And, at this time I asked him, or I told him that he could not buy the meat there. And I asked him: Where did you get the meat that's stamped NOT FOR SALE? You can't buy it at Warehouse Market. He told me that apparently the meat was left in the vehicle, also, from the night before cause the people had left meat in there when they took them home. He said: 'We were all very drunk. Didn't know what we were doing.'
>
> • • •
>
> OFFICER SMITHSON:
>
> A. This is a picture of the groceries and frozen meat items that were also found in the rear of the pickup. I asked him about it, and he stated he had bought it at Warehouse Market.
>
> MR. TURPEN:
>
> Q. And he later stated what?

We initially note that the defendant failed to object to Trooper Smithson's testimony at the time it was offered at trial. This Court has consistently held that when no specific objections are made at trial to the admission of a defendant's inculpatory statements, such objections cannot later be made as assignments of error on appeal. Long v. State, 567 P.2d 110 (Okl.Cr.1977). See also, U.S. v. Holliday, 474 F.2d 320 (10th Cir.1973).

In addition, the defendant did not include this assignment of error in his motion for new trial nor in his petition in error, and has not properly preserved this assignment of error for review. Hawkins v. State, 569 P.2d 490 (Okl.Cr.1977); Chronister v. State, 538 P.2d 215 (Okl.Cr.1975).

Furthermore, even if the alleged error had been properly preserved for review, we are of the opinion, after having carefully reviewed the record before us, that the questions asked of the defendant were purely investigatory in nature, and were not

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A. He later stated that it belonged to the people that he had picked up at the Eight-Ball.

MR. TURPEN:

Q. The night before?

A. Yes, sir.

• • •

A. Okay. About that residence. Did you ever inquire as to why they stopped there?

A. Yes, I did. I asked Mr. Coleman why they had stopped at this residence. He said: We live here. And I asked his wife later the same question. She verified--

MR. PEARSON: Asked who later? I'm sorry.

A. His wife. And she verified it. I asked them if they had a key to the residence? They said: 'No.' And later Mr. Coleman said: 'It's a friend of ours house' and he called the friend's name. I don't remember what the name was. Sheriff Gilbert was there. He knew who lived there, who had built the house, and he stated that was not the name of the people that owned the house.

accusatory. The law enforcement officer who asked the questions had no inkling that Coleman had been involved in a homicide, at the time the questions were asked; thus, it cannot be said that the purpose of the questioning was to elicit a confession. The defendant was arrested for traffic violations and possible D.U.I., and it was not until Trooper Smithson called the homicide scene, while in route to the Wagoner County Jail, that the defendant became the "focus" of a homicide investigation, and he was immediately read his Miranda rights warning at that time. See, Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). Thus, we are of the opinion that the questioning was not improper.

Moreover, even if the questioning had been improper, it is well established that the admission of statements obtained in violation of Miranda may be said to constitute harmless error.[3] Harryman v. Estelle, 616 F.2d 870 (5th Cir.1980), cert. denied 101 S.Ct. 161; Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). In determining whether the harmless error rule is applicable, we must determine whether, absent the unconstitutional defect, "the evidence remains not only sufficient to support the verdict but so overwhelming as to establish the guilt of the accused beyond a reasonable doubt." Chapman, supra.

A review of the record reveals that evidence of Coleman's guilt, although circumstantial, was overwhelming. The fact that the statements were admitted had no effect on the other substantial evidence introduced against Coleman at trial. As discussed in the first assignment of error, the Sewards' wallets and the Warrens' meat and groceries, were discovered, pursuant to a valid search, in the defendant's pickup only two hours after the homicides. Also,

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3. The record in this case reflects no evidence that defendant's statement was involuntary.

at the time of his arrest, approximately $210.00 in cash and a $2.00 bill were found in the defendant's shirt pocket. Mrs. Warren, the victim's sister, testified that her brother carried large sums of money and a $2.00 bill for good luck in his wallet. At trial, two witnesses identified the defendant's white camper pickup truck as being similar to a white camper pickup they had seen in front of the Warrens' residence at the approximate time of the homicides. Jeanette Coleman, the defendant's "alleged common law wife," testified that at approximately 3:30 on the afternoon of February 9, 1979, the defendant left their residence with a shotgun and shells and returned at approximately 4:15. Defendant's brother, Vernon Dale Coleman, Sr., testified that after the defendant's arrest on the evening of February 9, he retrieved a .28 gauge shotgun (State's Exhibit No. 19) and a box of Federal brand, No. 6 load shotgun shells from the defendant's residence and conveyed the evidence to Muskogee County Investigator Gary Sturm between February 10 and February 11, 1979. Tom Jordan, a ballistics specialist, testified that State's Exhibit No. 19 was an uncommon gauge and brand of shotgun and was consistent with the weapon and ammunition used in the Seward homicides. Finally, Eli Maghee, who was incarcerated with Coleman prior to trial, testified that the defendant recounted the details of the homicides and explained the reasons for the murders as being that, "you just don't leave any witnesses cause you got a lot less chance of getting convicted."

Further, the defendant does not allege that the admission of the statements precluded him from introducing exculpatory evidence or hindered his defense in any manner.[4] The second assigment of error is without merit.

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[4] Defendant's defense was that he did not have time to commit the murder; that Eli Maghee had a reputation of being untruthful and that his sister-in-law had given him $400 in cash the week of the homicides.

III.

In his third assignment of error, the defendant argues that the trial court erred by admitting, over objection, allegedly prejudicial photographs. Specifically, Coleman complains of State's Exhibits No. 12F and 12I, which were black and white photographs of the murder victims taken at the scene of the homicides, and State's Exhibit No. 18A, which was a color photograph taken before the autopsy depicting the entrance wound in the back of the victim's head.

We are of the opinion that in accordance with the test set forth in Oxendine v. State, 335 P.2d 940 (Okl.Cr.1958), the probative value of the evidence in question outweighs any prejudicial effect. See also, Glidewell v. State, 626 P.2d 1351 (Okl.Cr.1981). In the instant case, the photographs of the victims at the scene of the crime tend to show that the victims were killed in an execution type manner in the basement. Also, the photograph of the entry wound in the back of the victim's head corroborates the ballistics expert's testimony and the pathologist's testimony that the shotgun was fired at point blank range. These photographs show definitely that the intent was to kill.

Finally, the admission of allegedly gruesome photographs is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. Glidewell v. State, supra. We note that the trial court excluded several other photographs for their prejudicial effect and determined that Exhibits 12F, 12I and 18A were probative and admissible. This assignment of error is without merit.

IV.

In his fourth assignment of error, the defendant alleges that the trial court erred by allowing Jeanette Coleman, the defendant's alleged common law wife,[5] to testify. He contends that

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[5] The trial court ruled that Jeanette Coleman was the common law wife of the defendant's older brother Abe Coleman, whom she had not divorced; therefore, she could not be the defendant's common law wife.

her testimony violates the husband/wife privilege under 22 O.S.1981, § 702 and 12 O.S.1981, § 2405. In Lavicky v. State, 632 P.2d 1234 (Okl.Cr.1981), we said that although 22 O.S.1981, § 702 has not been specifically repealed, the legislature intended that 12 O.S.1981, § 2504 supercede all prior legislation on the subject. Accordingly, the statute to apply in the present case is 12 O.S.1981, § 2504 which provides in pertinent part:

> A. A communication is confidential for purposes of this section if it is made privately by any person to his spouse and is not intended for disclosure to any person.
>
> B. An accused in a criminal proceeding has a privilege to prevent his spouse from testifying as to any confidential communication between the accused and the spouse.

At trial, Jeanette Coleman testified in regard to the events of the day of the homicide. Our initial inquiry is whether her testimony breached any confidential communications.

Jeanette testified that on the day of the homicide, the defendant came home at approximately 3:30, retrieved a shotgun and shells from their bedroom, left in his white camper pickup, and returned at approximately 4:15 p.m. We are of the opinion that this testimony did not concern a privileged communication. The privilege does not extend to matters learned through observation of the spouse's non-communicative acts which are not intended to be confidential. See, Moore v. State, 605 S.W.2d 445 (Ark.1980); State v. Benner 284 A.2d 91 (Me.1971) In the instant case, the defendant had been hunting earlier that day and therefore Jeanette's suspicions weren't aroused when he left for the second time with the shotgun. It is clear that the defendant's conduct occcurred without any intent by him that his conduct be kept confidential. State v. Benner, supra.

Jeanette also testified that, prior to going grocery shopping the defendant stated that they owned the groceries in the back of the camper. Finally, she stated that at the scene of their arrest, the defendant gave her a turquoise watch to keep, and then

requested she give it back when they were being transported to Muskogee. We are of the opinion that this testimony also did not breach any confidential communications. Communications are not confidential if made in the presence of third parties. Lavicky v. State, sup.a. Since these statements of the defendant, to which Jeanette testified, were made in the presence of third parties, his contention is without merit. Accordingly, this assignment of error is also without merit.

V.

In his fifth assignment of error, Coleman contends that the trial court committed reversible error by admitting evidence of his escape from the county jail, evidence of the burglary of the Warren residence and evidence of the murder of Roxie Seward.

We initially find, from a review of the record, that the State complied with procedures necessary to introduce evidence of other crimes, as set forth by Burks v. State, 594 P.2d 771 (Okl.Cr.1979). The State furnished the defendant with written notice, ten days before trial,[6] of its intent to introduce evidence of the escape, burglary and murder. In the notice of intent to introduce evidence of other crimes, and at the time the evidence was offered, the prosecutor specified the exception under which the evidence was sought to be admitted.[7] Additionally, the trial court gave the jury a limiting instruction regarding evidence of other crimes. Further, it is well established that evidence of an escape from custody by an accused is admissible as showing consciousness of guilt. Odum v. State, 651 P.2d 703 (Okl.Cr.1982). See also, Brinlee v. State, 608 F.2d 839, 10th Cir.1979, cert. denied 444 U.S. 1047, 100 S.Ct. 737, 62 L.Ed.2d 733 (1980).

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[6] The State filed a notice of intent to offer evidence of other crimes on August 27, 1979, and trial began on September 25, 1979.

[7] The State advised that the evidence was offered as an exception to other crimes evidence based on res gestae as well as proof of identity of the defendant and defendant's intent to kill.

Finally, we note that the burglary of the Warren residence and the murder of Roxie Seward can be considered to be a part of the res gestae of the murder of John Seward. Burks v. State, supra. The burglary and murder were committed contemporaneously with the murder of John Seward and were inseparable parts of a single criminal episode; the charges should have been filed in a single information, listing the various counts. See, Chaney v. State, 612 P.2d 269 (Okl.Cr.1980). We find no merit in the defendant's fifth assignment of error.

VI.

In his sixth assignment of error, the defendant argues that he was denied a fair trial by reason of the district attorney's improper and inflammatory remarks made during closing argument. We initially note that although defense counsel moved for a mistrial based on improper prosecutorial remarks at the conclusion of State's argument, he did not interpose an objection to any of the statements during the course of closing argument. Since no objection was made at the time the alleged prejudicial statements were made, nor was any request made for an admonishment to the jury regarding them, the error has not been properly preserved for review. Smith v. State, 594 P.2d 784 (Okl.Cr.1979). Although defense counsel failed to object to the numerous instances of alleged prosecutorial misconduct, we shall review the record for fundamental error. Cobbs v. State, 629 P.2d 368 (Okl.Cr.1981).

While some of the remarks were unnecessary and are not to be condoned.[8] they were not so grossly improper, in light of the

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[8] The transcript reads in part as follows:

> Folks, what do we talk about when we talk about First Degree Murder? We're talking about--we're talking about this man's head! I don't mean to be shocking, ladies and gentlemen of the Jury, but we're talking about this man's head being turned into a puddle of blood and gray hairs at the bottom of the stairs. That's the reality of it. I'm not trying to shock anybody. That's the reality of it. That a living human being's head was turned into a puddle of blood and hair because of him, based on the evidence. (Tr. 787).

evidence presented, as to have affected the verdict of the jury; thus, no modification or reversal is required. See, Chaney v. State, supra.

VII.

In his seventh assignment of error, the defendant alleges that reversible error occurred at trial by reason of the prosecutor's knowing use of perjured testimony. Prosecution witness, Eli Maghee, was incarcerated with the defendant during the summer of 1979, and testified as to conversations he had with Coleman.

Citing 21 O.S.1981, § 496, the defendant alleges a discrepancy exists between witness Maghee's testimony at the defendant's preliminary hearing in Tulsa County for the murder or Russell Lewis and Maghee's testimony at the trial in Muskogee County for the murder of John Seward, because at the preliminary hearing in Tulsa Maghee did not testify as to his conversations with the defendant regarding the murders of the Sewards in Muskogee County.

> • • •
>
> But I want you to think about the last few seconds in John Seward's life as he's being marched down those stairs with his wife, you know, to what became a human slaughter house, and think about the horror he must have felt. And think about the terror he must have felt as he spent his last few seconds on this earth--a man who, I suggest to you, had the right to die with more dignity. Let's think about it. (Tr. 788).
>
> • • •
>
> Last witness. Mrs. Warren. Mrs. Warren described this--the home she lived in here--that's where she lives. It's nice to live in a home where your brother was murdered in the back basement. Think about that, please.
>
> John Seward is dead and gone forever. Plus, there's more than one victim. We all suffer a little, but think of the family that's still living in the home and where her brother was murdered in the basement. See, it points out that there's more than one victim when it comes to cold-blooded murder. When a man does what this man did, Charles Coleman, on that

A review of the preliminary hearing transcript from the Tulsa County case reveals that there was no questioning by the State's counsel on the subject of the Seward murders. Obviously, the omission of testimony lacks an essential element of perjury. See, Holt v. State, 506 P.2d 561 (Okl.Cr.1973).

Further, at trial in the present case, the defense counsel had ample opportunity to cross-examine witness Maghee concerning any inconsistent statements which he might have given. Taylor v. State, 555 P.2d 1073 (Okl.Cr.1976). The jury was properly instructed in regard to the weight and credibility to be given the testimony of any witness. We find this assignment of error to be without merit.

VIII.

In his eighth assignment of error, the defendant alleges that he should have received a preliminary hearing on the bill of particulars. Specifically, he argues that since a preliminary hearing is required in all after former conviction of a felony (AFCF) cases, the same requirement should be had in capital cases. We have recently rejected this argument in Brewer v. State, 650 P.2d 54 (Okl.Cr.1982). In Brewer, supra, we stated that 21 O.S.1981, § 701.9 apprises the defendant of all possible penalties he faces. In addition, 21 O.S.1981, § 701.10 specifically states that "only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible." These procedures eliminate any element of surprise; therefore, this assignment of error is without merit.

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day, February 9th, when he takes them down into the basement of the house and murders them in cold-blood, if you will, when you do that, you see you got more than one victim. You've got more than just Roxie and John Seward, you see, you got a family. You got people left behind. See, this was a pretty expensive shopping spree. I mean, a lot of people have suffered, if you know what I mean, based on the evidence, I mean, from the witness stand, that Mrs. Warren testified about. (Tr. 830).

IX.

In his ninth assignment of error, the defendant alleges that the trial court improperly admitted evidence in the second stage which was not previously made known to him. In support of his argument he cites 21 O.S.1981, § 701.10, and alleges that he did not receive notice in the Bill of Particulars that the State intended to introduce evidence that he kidnapped an Arizona highway patrolman after his escape from county jail.

The Bill of Particulars contained the following pertinent language:

> 5. That there exists a probability that the defendant Charles Troy Coleman will commit future criminal acts of violence that will constitute a continuing threat to society, based on the following:
>
> • • •
>
> On the 23rd day of April, 1979, after the defendant had been bound over for trial for the murders of John and Roxie Seward, and it appearing that he would be held accountable for these two deaths and would be taken to trial for the commission of the murders, he did then and there escape from lawful confinement in the Muskogee County jail, fleeing beyond the borders of the State of Oklahoma, further illustrating his contempt and total disregard for the rules of a structured and orderly society and creating a further danger to other lives, including those of the law abiding citizens of this state, and in other areas of this nation; . . .

We are of the opinion that the defendant did receive sufficient notice of the evidence which the State intended to introduce in support of the aggravating circumstance.[9] The Bill of Particulars is specific in its allegation of defendant's escape from the county jail, and the defendant kidnapped the Arizona highway patrolman on the five day spree subsequent to his escape.

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[9] The aggravating circumstance is found in 21 O.S.1981, § 701.12.2 which provides in part:

> Aggravating circumstances shall be:
>
> • • •
>
> 7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; or . . .

Furthermore, the defendant was made aware of the evidence because the Arizona highway patrolman had testified to the details of the kidnapping at the preliminary hearing in the Tulsa County murder, a transcript of which had been provided defense counsel. In Chaney v. State, supra, we said that 21 O.S.1981, § 701.10 is designed to give the defendant appropriate notice of the evidence of aggravating circumstance(s). We are of the opinion that in the instant case the State complied with this requirement. Accordingly, this assignment of error is without merit.

X.

In his tenth assignment of error, the defendant complains that four prospective jurors were excused for cause in violation of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). In Chaney v. State, supra, we said:

> In Witherspoon, the Supreme Court held that persons cannot be excused from jury service for cause just because they are opposed to the death penalty. They can be excused for cause if their views are so strong that they would refuse to return a verdict of guilty, where it was justified, because the defendant could be sentenced to death. Prospective jurors can also be excused for cause if they have decided in advance that they will not vote to impose the death penalty, regardless of the circumstances. However, the questioning in this area during voir dire cannot be too specific:
>
> ' . . . The most that can be demanded of a venireman . . . is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. . . ' (Emphasis original).

In the instant case, we believe that it was proper to excuse the jurors for cause. All four jurors stated unequivocably that they would not impose the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings.[10] See also, Parks v. State, 651 P.2d 686 (Okl.Cr.1982). We therefore find this assignment of error to be without merit.

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[10] Defendant objected to the following jurors being excused for cause:

XI.

In the final assignment of error, the defendant alleges that three of the convictions relied upon to establish the aggravating circumstance were void and therefore the sentence of death should not have been imposed. At trial, an authenticated copy of the minute entries from the District Court Clerk of Elmore County of the State of Alabama, which reflect the defendant's convictions in three cases, was admitted as evidence of his prior conviction of a felony involving the use or threat of violence.[11] Defendant argues that these convictions are void because they do not show on their face that he knowingly and voluntarily waived his federal constitutional rights before entering a guilty plea. However, the record does indicate that he was represented by counsel upon entering his pleas of guilty. See, Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967). The record also reveals that an appeal was never perfected from the 1967 convictions. Defendant has not alleged that there are pending collateral attacks on the convictions through post-conviction relief. See, State v. Jordan, 614 P.2d 825 (Okl.Cr.1980). We are of the opinion that the Alabama convictions were properly introduced. See, Ashlock v. State, 643 P.2d 324 (Okl.Cr.1982). Further, the State introduced another 1973 conviction[12] from the Superior Court of San Luis Obispo County in the State of California, which supports the aggravating circumstance that he was convicted of a prior felony involving the use or threat of violence. Defendant's final assignment of error is without merit.

Juror Geisinger;
Juror Barnes;
Juror Halpain;
Juror Crager.

[11] 21 O.S.1981, § 701.2 provides that:

> Aggravating circumstances shall be:
>
> (1) The defendant was previously convicted of a felony involving the use or threat of violence to the person.

[12] Defendant has not challenged the validity of this conviction.

XII.

Pursuant to our statutorily imposed duty under 21 O.S.1981, § 701.13, we now hold:

1) The sentence of death was not imposed "under the influence of passion, prejudice or any other arbitrary factor." This was indeed a merciless execution of two innocent people who intruded upon the defendant as he burglarized a home. However, a complete review of the record reveals that the trial court was sensitive to the nature of the case and that defendant's attorney competently protected his constitutional rights. We are of the opinion that the defendant received a fair and impartial trial;

2) The evidence supports the jury's finding of statutory aggravating circumstances as enumerated in Section 701.12. The basis for this holding should be clear from the body of this opinion.[13]

3) We have made a comparison of this case with other first degree murder cases before this Court and we find that the death penalty is not excessive.[14] The jury found five aggravating circumstances present in the instant case. We find that the evidence supports all five aggravating circumstances. We find no reason to disturb or modify the imposition of the death sentence.

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[13] The jury found that the evidence supported the following five circumstances: 1) the defendant was previously convicted of a felony involving the use or threat of violence to the person; 2) the defendant knowingly created a risk of death to more than one person; 3) the murder was especially heinous, atrocious or cruel; 4) the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; 5) the existence of probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

[14] We have compared this case with cases in which the defendant received the penalty of death:

Stafford v. State, _____ P.2d _____, _____ OBAJ _____ (Okl.Cr.1983); Davis v. State, _____ P.2d. _____, _____, 54 OBAJ 1290 (Okl.Cr.1983); Ake v. State, 663 P.2d 1, (Okl.Cr.1983); Smith v. State, 659 P.2d 330 (Okl.Cr.1980); Parks v. State, 651 P.2d 686 (Okl.Cr.1982); Jones v. State, 648 P.2d 1251 (Okl.Cr.1982); Hays v. State, 617 P.2d 233 (Okl.Cr.1980); Eddings v. State, 616 P.2d 1159 (Okl.Cr.1980)(Remanded for resentencing 102 S.Ct. 869), Chaney v. State, 612 P.2d 269 (Okl.Cr.1980).

We have also compared Coleman's sentence in light of cases in which death sentences have been modified to life imprisonment: Glidewell v. State, _____ P.2d _____, 54 OBAJ 1284 (Okl.Cr.1983); Johnson v. State, _____ P.2d _____, _____ OBAJ _____ (Okl.Cr.1983)(53 OBAJ 730, Okl.Cr. 1982; opinion withdrawn);

Accordingly, the judgment and sentence is AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT OF MUSKOGEE COUNTY, OKLAHOMA
THE HONORABLE HARDY SUMMERS, DISTRICT JUDGE

CHARLES TROY COLEMAN, appellant, was convicted of the crime of Murder in the First Degree, in the District Court of Muskogee County, Case No. CRF-79-102. He was sentenced to death, and he appeals. AFFIRMED.

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OPINION BY BUSSEY, P.J.
CORNISH, J., CONCURS
BRETT, J., CONCURS

Boutwell v. State, 659 P.2d 322 (Okl.Cr.1983); Driskill v. State, 659 P.2d 343 (Okl.Cr.1983); Jones v. State, 660 P.2d 634 (Okl.Cr.1983); Munn v. State, 658 P.2d 482 (Okl.Cr.1983); Odum v. State, 651 P.2d 703 (Okl.Cr.1982); Burrows v. State, 640 P.2d 533 (Okl.Cr.1982); Franks v. State, 636 P.2d 361 (Okl.Cr.1981); Irvin v. State, 617 P.2d 588 (Okl.Cr.1980).

We have also considered this case in light of cases in which the defendant's convictions and sentences of death were reversed or otherwise remanded for subsequent proceedings: Hatch v. State, 662 P.2d 1377 (Okl.Cr.1983); Hall v. State, 650 P.2d 893 (Okl.Cr.1982); Brewer v. State, 650 P.2d 54 (Okl.Cr.1982); Heger v. State, 612 P.2d 1369 (Okl.Cr.1980).

Appendix "B"

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
SEP 19 1983
Ross N. Lillard, Jr.
CLERK

83-5776

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CHARLES TROY COLEMAN, Petitioner,	)	
-vs-	)	No. F-79-600
THE STATE OF OKLAHOMA, Respondent.	)	

ORDER DENYING PETITION FOR REHEARING, DENYING SUPPLEMENTAL PETITION FOR REHEARING AND OVERRULING MOTION FOR NEW TRIAL BASED UPON NEWLY DISCOVERED EVIDENCE

The petitioner has argued upon petition for rehearing, supplemental petition for rehearing and motion for new trial based upon newly discovered evidence that this Court erred in its original determination that the victims' wallets, the meatwrappers marked "Hogle, Not For Sale" and the foodstuffs which implicated him in the murders, were the product of a legitimate police inventory of his pickup. See, Coleman v. State, 54 OBAJ at 1921. He maintains such a finding was contrary to the testimony of witnesses presented at his preliminary hearing, his trial and a civil suit relating to these matters.[1]

We have reconsidered pertinent portions of our original opinion concerning the inventory and the conduct of the officers relating thereto, and have made all necessary substitutions in our

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[1] The petitioner has requested to supplement the record in this case in both his supplemental petition for rehearing and his motion for new trial upon newly discovered evidence with excerpts of testimony from a civil suit styled CHARLES T. COLEMAN, SR., v. MICHAEL C. TURPEN, District Attorney, BILL VINZANT, KEIFER WRECKER SERVICE, Case No. 80-221-C, which was held on June 24, 1983. The proffered testimony is that of Agent Chrisco and Trooper Smithson, with which the petitioner seeks to establish that Agent Chrisco's inventory was limited to searching for evidence pertaining to the murders of John and Roxie Seward. He thereby reasserts his conclusion that the inventory was a subterfuge for a warrantless search.

This testimony was not part of the present case, and is not now properly before this Court. Nonetheless, the transcripts of the petitioner's preliminary hearing and trial serve as an adequate base for proper consideration and disposition of the issue.

order styled, ORDER CORRECTING OPINION, COLEMAN v. STATE, CASE NO. F-79-603, dated 19 September, 1983. Based upon the changes made therein, the appellant's arguments concerning the inventory are dismissed.

The petitioner again asserts his contention that he was given inadequate notice of the aggravating circumstances alleged against him in support of the death penalty. This Court remains convinced that the petitioner was sufficiently apprised of the specifics of the charges. The argument is without merit.

WHEREFORE, having examined the petitioner's arguments in the above styled and numbered cause, being fully advised of the premises and having made all necessary changes in the disposition of this case, the petition for rehearing is DENIED, the supplemental petition for rehearing is DENIED and the motion for new trial upon newly discovered evidence is OVERRULED. The Clerk of this Court is directed to issue the mandate forthwith.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 19th day of September, 1983.

H. J. Bussey

HEZ J. BUSSEY, PRESIDING JUDGE

Tom R. Cornish

TOM R. CORNISH, JUDGE

Tom Brett

TOM BRETT, JUDGE

ATTEST:

Ross O. Pilliard Jr.

Clerk

Appendix "C"

83-5776

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
SEP 19 1983
Ross N. Lillard, Jr.
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CHARLES TROY COLEMAN,
Appellant,
-vs-
THE STATE OF OKLAHOMA,
Appellee.

No. F-79-600

ORDER CORRECTING OPINION

On July 11, 1983, an opinion was filed in the above styled and numbered appeal. It has been argued upon the appellant's petition for rehearing that this Court erred in its treatment of Proposition No. One of the opinion.

After considering the appellant's arguments, this Court finds that the opinion should be changed.

IT IS THEREFORE THE ORDER OF THIS COURT, that the attached pages and the accompanying footnote shall be substituted in lieu of the second and third full paragraphs on page four, and footnote 1 of the original opinion.

WITNESS OUR SIGNATURES AND THE SEAL OF THIS COURT this 19th day of September, 1983.

HEZ J. BUSSEY, PRESIDING JUDGE

TOM R. CORNISH, JUDGE

TOM BRETT, JUDGE

ATTEST:

Clerk

Both Officer Rose and Trooper Smithson testified that the inventory initiated at the time of the defendant and his passenger's arrest was pursuant to established departmental policy. As stated above, the wallets, the meat marked "Hogle, Not For Sale" and the other foodstuffs were all found during the initial stages of the inventory. The fact that neither Officer Rose nor the other officers had yet to reduce the findings of their inventory to writing is immaterial. The record discloses the good faith in which the inventory was initiated. It was only the sudden focus upon the defendant as a murder suspect which prevented completion of the list.

Although Agent Chrisco may have had time to arrange for a search warrant to be obtained while the pickup was being towed to Muskogee, we need not reach the issue of the appropriateness of his actions. The evidence complained of had previously been legally discovered, and was properly in police custody by virtue of the impoundment of the vehicle and the contents thereof. Swain v. State, 621 P.2d 1181 (Okl.Cr.1980); South Dakota v. Opperman, supra.[1]

Thus, we find that the arrest of the defendant and the subsequent impoundment and inventory of his vehicle were proper, and the evidence of which the defendant now complains was properly admitted. This assignment of error is without merit.

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[1] During Agent Chrisco's testimony at the defendant's trial, a list of items taken from the appellant's truck after it had been towed to the garage was introduced. We do not find Officer Chrisco's testimony to constitute error, since he simply enumerated the items which had already been discovered.